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EXAMINER

FREEMAN, JOHN D

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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/565,868
Filing Date: July 12, 2006
Appellant(s): FORLONI ET AL.

Rupert B. Hurley Jr.
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 12/11/2009 appealing from the Office action mailed 1/27/2009.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

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(8) Evidence Relied Upon

The following is a listing of the evidence relied upon in the rejection of claims under appeal.

4,496,714	Murata et al.	01-1985
3,969,176	Bassett et al.	07-1976
2003/0108755	Murschall et al.	06-2003
3,541,040	Laird et al.	11-1970
6,423,421	Banaszak et al.	07-2002

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

35 USC 102

Claims 15-18, and 27-28 are rejected under 35 U.S.C. 102(b) as being anticipated by Murata et al. (US 4,496,714).

Murata et al. disclose a polyester and laminates containing said polyester (col 1 ln 8-12). The polyester includes units of aromatic polyesters (col 2 ln 10-57). The laminates can take the form of a film (col 14 ln 11-14).

The laminates may take the form of (B)/(A)/(C)/(D) wherein A is the polyester of Murata's invention (col 12 ln 39-56). (B) and (C) are "adherend layers" (col 12 ln 43-44), said adherend materials include ethylene-vinyl alcohol and polyester (col 12 ln 1-21). (B) can be polyethylene terephthalate, an aromatic polyester (col 27 ln 52-54). (D) can be polyethylene or polypropylene (col 12 ln 50-52).

Murata further teaches biaxial stretching of the laminates to improve mechanical strength and other properties (col 14 ln 20-22).

Regarding the modulus properties of the film as found in the present claims 15-18, the examiner takes the position that the film described by Murata, which includes aromatic polyesters, inherently possesses the modulus properties disclosed by Applicant.

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35 USC 103

Claims 19-26 and 35-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Murata et al. (US 4,496,714) in view of Murschall et al. (US 2003/0108755) in view of Bassett et al. (US 3,969,176).

Murata discloses polyester-containing laminates as previously explained.

Murata is silent with regard to heat-setting the film and the use of a tenter frame to biaxially stretch the films.

Murschall et al. (hereafter Murschall) disclose a biaxially oriented polyester film [0001]. The process of producing the film includes:

- a. coextrude the layers,
- b. biaxially orient the film,
- c. and heat set the oriented film [0082-5].

Murschall teaches that the film can be simultaneously stretched in both directions with a tenter frame [0091].

Bassett et al. disclose that biaxially oriented films are heat set to have low shrinkage at elevated temperatures (col 1 ln 51-53).

At the time of the invention, it would have been obvious to one of ordinary skill in the art to use the general process as taught by Murschall to create a polyester film having low shrinkage at elevated temperatures.

Regarding the free shrink values in the present claims 19-22 and 26, and shrink tension values in claims 23-24, the examiner takes the position that the film described by Murata, which includes aromatic polyesters, upon biaxially stretching and heat setting as disclosed by Murschall, would intrinsically possess the values disclosed by Applicant.

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Claims 29-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Murata et al. (US 4,496,714).

Murata discloses polyester-containing laminates as previously explained.

Murata is silent with regard to the multilayer structures as claimed by Applicant.

Given Murata's disclosure, which states the polyester of his invention can be used as an adhesive (col 12 ln 39-43), as well as multilayer films (col 12, ln 49 and 55-56) having polyolefins and heat sealable layers (col 13 ln 3), one of ordinary skill in the art would easily contemplate the various structures of the present claims. For example, one of ordinary skill would recognize that multiple polyolefin layers would improve the moisture-barrier properties of the film, and an outer layer of polyethylene would make the film heat sealable, as they are intrinsic properties to polyolefins.

At the time of the invention, it would have been obvious to one of ordinary skill in the art to add multiple polyolefin cores to the film to increase the moisture-barrier properties, a heat sealable outer layer of polyethylene, and use various tie layers to maintain the structural cohesiveness of the film.

Claim 32 is rejected under 35 U.S.C. 103(a) as being unpatentable over Murata et al. (US 4,496,714) in view of Laird et al. (US 3,541,040).

Murata discloses polyester-containing laminates as previously explained in paragraphs 16-20.

Murata is silent with regard to an anti-fog agent in the polyolefin core layer.

The use of anti-fog agents is well known in the art of packaging. For example, Laird discloses that polyolefin films often fog due to its inherent moisture-barrier properties (col 1 ln 50-64). Laird adds agents to create an anti-fog film (abstract).

At the time of the invention, it would have been obvious to one of ordinary skill in the art to include anti-fog agents in the polyolefin material to create packaging that does not fog.

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Claim 33 is rejected under 35 U.S.C. 103(a) as being unpatentable over Murata et al. (US 4,496,714) in view of Laird et al. (US 3,541,040).

Murata discloses polyester-containing laminates as previously explained in paragraphs 2-6.

Murata is silent with regard to an anti-fog agent in the polyolefin layer.

The use of anti-fog agents is well known in the art of packaging. For example, Laird discloses that polyolefin films often fog due to its inherent moisture-barrier properties (col 1 ln 50-64). Laird adds agents to create an anti-fog film (abstract).

At the time of the invention, it would have been obvious to one of ordinary skill in the art to include anti-fog agents in the polyolefin material to create packaging that does not fog.

Claim 34 is rejected under 35 U.S.C. 103(a) as being unpatentable over Murata et al. (US 4,496,714) in view of Banaszak et al. (US 6,423,421).

Murata discloses polyester-containing laminates as previously explained.

Murata is silent with regard to irradiating the laminates.

The use of radiation on films was well-known at the time of the invention. For example, Banaszak discloses a multilayer film crosslinked by irradiation at a level from 10-200 kiloGray (col 18 ln 5-20). Banaszak further discloses the irradiation process improves impact strength.

At the time of the invention, it would have been obvious to one of ordinary skill in the art to irradiate Murata's laminate within the range disclosed by Applicant to crosslink the polymers of the film and improve the impact resistance of the film.

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(10) Response to Argument

In dissecting the prior art, Appellant calculates that the odds of a skilled artisan randomly arriving at Appellant's claimed invention to be 1 in 1,152 (p12). From this Appellant submits that "a generic disclosure that presents a 1-in-1152 chance of arriving at Appellant's claimed invention is not anticipation of Applicant's claimed invention" (p12).

Respectfully, the examiner submits Appellant's standard for anticipation is inappropriate. To anticipate a claim, the reference must teach every element in the claim. Whether the odds of deciding to make the claimed product are high or low is immaterial. The examiner maintains Murata discloses each element of the claim as described in the rejections of record.

Appellant, in responding to previous arguments by the examiner, states that "a species can be patentable over the disclosure of a genus" (p15). Appellant then submits that the "1-in-1152 is a species (i.e., the '1') within a disclosed large genus (i.e., the '1152') of possibilities with the reference providing no express teaching directed to the specific '1' in the '1152' [i.e., the claimed invention]" (p15-16).

The examiner disagrees with Appellant's interpretation of the 1152 possibilities as a genus. These possibilities are distinct species, each of which can be clearly envisaged from Murata by one of ordinary skill, not a general genus. That an artisan must mentally "build" each species from a series of choices does not negate the fact that Murata discloses these species. Otherwise, following Appellant's standard, each of the 1152 would be novel over Murata because the reference does not spend the time to write out each of the 1152 species rather than taking the shortcut of merely presenting acceptable identities for the layers and the acceptable combinations of layers.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/John Freeman/

Examiner, Art Unit 1794

Conferees:

/Callie E. Shosho/
Supervisory Patent Examiner, Art Unit 1794

/William Krynski/
Quality Assurance Specialist, TC 1700